IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 809 of 2005
To
TAX APPEAL No. 811 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.A.MEHTA Sd/-

HONOURABLE MS.JUSTICE H.N.DEVANI Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME-TAX - Appellant(s)
Versus
PRAJAPATI BABABHAI NATHABHAI - Opponent(s)

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Appearance :
MR TANVISH U BHATT for Appellant(s) : 1,
None for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE D.A.MEHTA
and
HONOURABLE MS.JUSTICE H.N.DEVANI
Date : 27/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE D.A.MEHTA)

1 In all these three appeals the appellant revenue has proposed the following identically worded question :

> *"(i) Whether the Commissioner (Appeals) has inherent powers u/s 251 of the Income Tax Act,1961 for recalling/reviewing its order passed in appeal?"*

2 Mr.Tanvish U.Bhatt, learned Standing Counsel appearing on behalf of the appellant has very vehemently assailed the impugned order of Tribunal dated 30/7/2002. The contention is : that the Tribunal has laid down an absolute

proposition of law regarding powers of Commissioner (Appeals) which is not supported by provisions of Section 251 of the Income Tax Act,1961 (the Act). That Commissioner (Appeals) does not have any power to review and hence, cannot exercise any power of recalling an order because recalling the order would amount to reviewing the earlier order. He has placed reliance on the Apex Court decision in the case of Patel Narshi Thakershi and others v/s Pradyumansinghji Arjunsinhji, AIR 1970 (SC) 1273.

3 The appeals are not only misconceived but are frivolous, to say the least, as the facts narrated hereinafter would go to show. It is an admitted position that there is no dispute as to the facts recorded by the Tribunal.

4 The assesee had preferred appeals before Commissioner (Appeals) against the assessments

framed by the Assessing Officer. The said appeals came to be decided exparte vide order dated 13/2/1997 for non appearance, as recorded by Commissioner (Appeals). On 14/3/1997 the assessee moved rectification application seeking recall of the exparte order inviting attention of Commissioner (Appeals) to the fact that the assessee had attended before Commissioner (Appeals) on the date of hearing, but as the Commissioner (Appeals) was preoccupied with other work the hearing could not take place. The assessee also requested the Commissioner to verify the presence of the representative of the assessee by verifying the attendance book kept by the office of Commissioner (Appeals).

5 It is recorded by Commissioner (Appeals) that *"I am satisfied that due to some mistake occurred either by oversight or due to non verification of the Attendance Register kept out of the*

office, due to the ex-parte order, the appellant has been prevented by sufficient cause to give proper opportunity of being heard". Thereupon Commissioner (Appeals) recalled the order dated 13/2/1997 and fixed the appeals for hearing.

6 Aggrieved by the order of Commissioner (Appeals), revenue carried the matters in appeal before the Tribunal. Taking note of the aforesaid facts the Tribunal has upheld the order made by Commissioner (Appeals) holding that there was no default of non appearance on part of the assessee and therefore, Commissioner (Appeals) had rightly recalled an exparte order for deciding the appeals afresh after providing an opportunity of hearing. In the process, the Tribunal has quoted the decision in the case of *Gopi Krishna Agarwal vs Union of India (1990) 25 ECC 412 (All),* wherein High Court of Allahabad has laid down that every authority has ancilliary and

incidental power to recall an order, if it is satisfied that the absence was for the reasons beyond the control of the appellant.

7 When the impugned order of Tribunal is read in its entirety it is apparent that it has merely confirmed the findings recorded by Commissioner (Appeals) in context of the factual matrix in which Commissioner (Appeals) had passed the earlier order dated 13/2/1997. The Tribunal has, in fact, not laid down any general proposition of law as was sought to be canvassed on behalf of the appellant-revenue.

8 The Apex Court decision in case of *Patel Narshi Thakershi and others* (supra) does not lay down any proposition to the contrary. In fact, the controversy involved before the Apex Court was entirely different and the observations in paragraph No.4 of the decision, on which reliance has been placed, have to be understood and

appreciated in context of the facts and circumstances in which the Apex Court was called upon to resolve the controversy before it.

9 Section 250(1) of the Act specifically lays down that Commissioner (Appeals) shall fix a day and place for hearing of the appeal. The learned Counsel for the appellant herein does not dispute that Commissioner (Appeals) is bound to hear an appeal before him, when the assessee who has filed the appeal after fulfilling all the necessary requisite conditions appears on the appointed day. However, it is submitted that Section 250 of the Act cannot be considered on the specious plea that once the order was made under section 251(1) of the Act the Commissioner (Appeals) would have no occasion to revert back to the provisoins of Section 250(1) of the Act.

10 The contention is based on a fallacious

premise. The provision is not meant for only making a show of granting hearing. The Commissioner (Appeals) is required to give an effective hearing to the appellant before him and in case where it is found from the record, of his own office, that appellant before him was not granted any hearing, much less an effective hearing, it cannot be stated that provisions of Section 250(1) of the Act have been complied with. As already noticed hereinbefore, it is not disputed on behalf of the appellant revenue that the assessee was never heard by Commissioner (Appeals). It is submitted that in the facts as are obtaining in the present case, the only remedy available to an assessee is to approach the Tribunal, have the order of Commissioner (Appeals) set aside and get the appeals restored to the file of Commissioner (Appeals).

11 The approach of revenue cannot be accepted.

It is necessary for revenue to appreciate that litigation is not a luxury, so far as an assessee is concerned, but a necessity. To drive an assessee to file an appeal before the Tribunal after payment of filing fees, await his turn and then obtain order of remand is nothing else but a luxury litigation which need not be indulged in. In the meantime the assessee would have to face recovery proceedings for no fault of his. The revenue does not stand to gain anything by adopting such an attitude. The State cannot be permitted to act in such cavalier manner so as to result in harassment of the citizen of this nation.

12 In the facts and circumstances of the case, not only appeals which were filed before the Tribunal, but even before this Court, are frivolous appeals. This becomes more apparent when one considers that the tax involved in the three matters is only Rs.52,597/-, Rs.64,025/-,

Rs.1,22,585/- respectively for each of the years under consideration. It is necessary to take note of the fact that the learned Counsel for revenue was informed that the appeals are frivolous, but he chose to persist with his address.

13 In the aforesaid circumstances not only the impugned order of Tribunal does not suffer from any infirmity so as to give rise to any substantial question of law, but is the only order which could have been made in the facts and circumstances of the case. The appeals are accordingly dismissed.

14 The appellant revenue is directed to pay an amount of Rs.5,000/- per appeal for filing frivolous appeals and wasting time of the Court. The amount to be paid within a fortnight from today to the Registry of this Court for credit of the Legal Service Authority of the High Court for filing frivolous appeals and wasting time of the Court.

Sd/- Sd/-
(D.A.Mehta, J) (H.N.Devani,J)

m.m.bhatt